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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1010

MAX SLATTON, JR.,
Petitioner,

v.

MARTIN K. EBY CONSTRUCTION COMPANY, INC. d/b/a
EBY & ASSOCIATES OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

Martin K. Eby Construction Company, Inc. d/b/a Eby & Associates of Arkansas

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ORDER GRANTING EXTENSION OF TIME

Respondents request of February 28, 1975 for an extension of time within which to file a response to the Petition for a Writ of Certiorari was granted and the time for filing a response was extended to and including April 2, 1975.

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OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Arkansas, Western Division, are unreported. The opinions of the Court of Appeals are reported at 491 F.2d 707 and 506 F.2d 505. The unreported opinions are set forth in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Petition of Writ of Certiorari invokes this Court's jurisdiction under 28 USC § 1254(1), even though the Courts below adopted the rule of law favorable to petitioner and none of the considerations enumerated in Rule 19 of the Rules of the United States Supreme Court are presented in this case.

QUESTION PRESENTED

Did the trial judge clearly abuse his discretion in granting a partial new trial on the issue of damages only unless petitioner accepted a $33,267.04 remittitur of the jury's $85,000.00 verdict?

STATEMENT OF THE CASE

After a jury trial in which the Jones Act, unseaworthiness, and damages issues were submitted to the jury in a general verdict form, petitioner was awarded a net judgment, after workmen's compensation payments were credited, of $83,-267.04. By memorandum Order filed November 28, 1973, the District Court, after denying other motions of respondent, found that the amount of the jury verdict was "grossly and shockingly excessive in light of the evidence" on damages and ordered in the alternative, a remittitur o a new trial on damages:

> "Personally, the Court thinks that an award within the range of $15,000 to $20,000 would have been fair and reasonable compensation to plaintiff, but the Court recognizes that the amount to be awarded in a case of this kind rests largely in the discretion of the jury. The Court thinks that the jury might have been justified under the evidence in awarding plaintiff as much as $50,000, but that

any award in excess of that sum would have been so grossly excessive as to shock the conscience of the Court.

"In view of what has been said it is Ordered that if the plaintiff within the next 20 days enters a remittitur in the amount of $33,267.04 defendant's alternative motion for a full or partial new trial will be denied. If the remittitur is not entered within that period of time, the Court's judgment will be set aside and a new trial ordered on the issue of damages only." (A. 14, 17).[1]

Thereafter, petitioner decided not to accept the remittitur and filed an immediate appeal. The United States Court of Appeals for the Eighth Circuit held that the District Court's new trial order was not appealable and denied the petitioner's appeal. *Slatton v. Martin K. Eby Construction Co., Inc.*, 491 F.2d 707 (8th Cir. 1974). After remand of the suit for further proceedings consistent with the District Court's order granting a new trial on the damage issue, the *petitioner* requested a trial to the Court without a jury on the basis of the damage evidence adduced in the first trial. The respondent joined in this request. In the second trial, the Court, sitting non-jury, reviewed all of the evidence pertaining to damages previously received in the first trial and entered its memorandum opinion on April 10, 1973 (Supp. A. 3). The Court allowed a recovery and judgment to be entered in the total amount of $17,267.04 after a credit for workmen's compensation benefits previously paid the petitioner by respondent.

Subsequently, a second appeal was taken by the petitioner from the final judgment entered after the second trial to the

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[1] Record references to the three printed volumes of the appendices utilized in connection with the appeal to the Court of Appeals are referred to as follows in order to avoid confusion:

"A."—Appendix (Petitioner)

"Supp.A."—Supplemental Appendix (Petitioner)

"Eby Supp.A."—Supplemental Appendix of Martin K. Eby Construction Company, Inc.

District Court on damages. In *Slatton v. Martin K. Eby Construction Co., Inc.* 506 F.2d 505 (8th Cir. 1974), the Court of Appeals affirmed the District Court's order entered upon the respondent's motion for a new trial and remittitur which granted a $33,267.04 remittitur and reduced the jury verdict in the first trial to $50,000.00.

REASON FOR DENYING CERTIORARI

The writ of certiorari should not be granted since none of the considerations of Rule 19 of the Rules of the United States Supreme Court are present in this case and nothing more is involved than questions of facts that have been resolved against petitioner both by the Trial Court and the Court of Appeals for the Eighth Circuit. In its decision in *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 508 (8th Cir. 1974), the Court of Appeals adopted the appellate standard for review of a remittitur granted by a trial court that was more favorable to petitioner and distinguished its prior ruling in *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439 (8th Cir. 1961), as not entirely dispositive of the remittitur issue presented in the instant case. In *Solomon*, Mr. Justice Blackmun (then Judge Blackmun) had held that the grant or denial of a motion for a new trial for excessive damages was basically a matter for the trial court with review granted only in rare situations where there was plain injustice or a monstrous or shocking result. In the instant case, the Court of Appeals in its opinion seemed to limit *Solomon's* rationale to those cases where review is sought of a trial court's refusal to set aside a jury award. The situation presented in the present case where the jury awarded one quantum of damages and the trial court determined that the damages were excessive was said to present opposing considerations that were, perhaps, not entirely governed by the *Solomon* rationale. *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 508 (8th Cir. 1974).

The Court of Appeals recognized and considered both the rule that the decision of the jury on the facts deserves great weight and the rule of *Altrichter v. Shell Oil Co.*, 263 F.2d 377 (8th Cir. 1959), that a trial in passing on a motion for new trial is not limited to viewing the evidence in the light most favorable to the prevailing party but may weigh evidence,

disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict. *Cf.* 6A Moore, Federal Practice ¶ 59.08[5]. The Court of Appeals reiterated the principle that the action of a trial court in setting aside a jury verdict is not in derogation of the right to trial by jury but an historic safeguard of the right to trial by jury. This view is in accord with the decision of this Court in *Dimick v. Schiedt*, 293 U.S. 474 (1935), which held that the use of remittitur to correct the error of a jury in arriving at a manifestly unjust verdict was not precluded by the Seventh Amendment since the scope and the meaning of that amendment are determined by "the appropriate rules of the common law established at the time of adoption of that constitutional provision in 1791." 293 U.S. at 476. In reconciling remittitur with the Seventh Amendment, this Court stated in *Dimick, supra*, at 486:

> "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. When the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess,—in that sense that it has been found by the jury,—and that the remittitur has the effect of merely lopping off an excrescence."

In distinguishing the situation of a grant of a new trial without remittitur, the Court of Appeals pointed out that the issue presented as to the standard of review of a remittitur awarded as a condition of denying a new trial was of first impression in the Eighth Circuit. *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 508 (8th Cir. 1974). The Court of Appeals adopted the ruling of *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972), which held that in determining whether there was a clear abuse of discretion by the trial court in ordering a remittitur, the reviewing standard of the appellate court is whether the remittitur was ordered for an amount less than the jury could reasonably find. *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 508-509 (8th Cir. 1974). And, this Court has recognized that a trial court has broad discretion in granting a new trial conditioned upon the acceptance of a remittitur when this action of the trial court was not without support in the record. *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955). Both the United States Court of Appeals for the Eighth Circuit in the present case and the Fifth Circuit in *Gorsalitz* relied on the following language of *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 149 (D.C. Cir. 1969), in determining whether a trial court erred in granting a remittitur:

> "The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was clearly within 'the maximum limit of a reasonable range.' "

The Court of Appeals noted that the trial court, in granting the remittitur, did not substitute its own view of the damages which was in the $15,000 to $20,000 range but ordered a remittitur of only the excrescence of the jury's verdict above $50,000 which was the maximum amount of damages that it felt in

the exercise of its sound discretion that the evidence would reasonably support. *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 509 (8th Cir. 1974).

Petitioner's ostensible reason advanced for granting his petition for certiorari is that the Court of Appeals did not draw from the damage evidence the factual inferences which he urges and, therefore, the Court of Appeals should have reversed the trial judge's ruling for a clear abuse of discretion. Such an argument is neither within the consideration of Rule 19 of the Supreme Court Rules nor raises legal issues of such national scope or importance that the writ of certiorari should be granted.

The categories of damage evidence which the petitioner argues are in support of his petition are the same as presented to both of the lower Courts. It is obvious that the District Court and the Court of Appeals did not agree with the petitioner's version of the factual inferences to be drawn from the damage evidence. In analyzing the facts presented, it should be remembered that the remittitur of $33,267.04 gave petitioner a verdict of $50,000.00 which he voluntarily declined to accept, presumably in the hope that upon retrial he could recover more than this amount. Moreover, the District Court did not deprive him of his right to a jury trial on the issue of damages. After declining to accept the $50,000.00 remitted verdict which was the maximum verdict that the District Court felt the evidence presented to the jury would reasonably support, the petitioner chose not to retry the damage issue to a jury but to submit this question to the Court for decision without offering any additional medical evidence on the doubtful issue of the alleged permanency of the petitioner's injury.

Wages Lost: It is true that petitioner was off work from the date of the accident on May 6, 1972 until September 27, 1973 and that he worked at a lesser rate of pay between September 27, 1973, shortly before the trial until the trial date on October

16-17, 1973. It is also true that petitioner's doctor who treated petitioner the day of the accident released him from the hospital that same day with a diagnosis of acute low back sprain (A. 20). The petitioner was also cleared by his treating physician for return to light work in June, 1972 (A. 22), and he was released from medical supervision completely for return to work as of August 21, 1973 (A. 43). While the petitioner testified that he was unable to perform the non-welding duties assigned to him by the respondent upon his return to light duty approximately one month after the accident (A. 77), there is no dispute that the petitioner did not try to obtain any other employment with other employers consistent with Dr. Rooney's recommendations until September 27, 1973, which was after the parties had been notified that the case had been set for trial (A. 82-83). Petitioner testified that after his attempt to perform light duties for respondent, he spent his time doing nothing but staying home and watching television for about four and one-half months prior to the taking of his discovery deposition in August, 1973 (A. 83).

In Judge Henley's Memorandum Opinion of April 10, 1974 (Supp. A. 3, 7), following retrial of the case non-jury, Judge Henley makes mention of the fact that the petitioner did not make a reasonable effort to seek employment consistent with his doctor's recommendations in mitigation of his damages following his release for light work until late September or early October, 1973, which was just before the October 16th jury trial. In determining the amount of damages the jury could reasonably find on the issue of actual lost wages to the date of trial, the trial court could not be said to have clearly abused his discretion by considering all of the facts relating to wage loss, including the absence of any effort by the petitioner to be gainfully employed consistent with his doctor's recommendations from the time of his release for light work in June, 1972, until shortly before the date of trial in October, 1973.

Medical Expenses: It was an undisputed fact that the petitioner's medical expenses were $1,390.94, which represents but a small part of petitioner's $50,000.00 verdict after remittitur. On retrial of the damage issue, the trial judge found petitioner's medical expenses to amount to $1,500.00 which was slightly more than the evidence on medical expenses would actually support. The amount of medical expenses gains significance in relation to the other evidence on damages when the medical treatment and reports which these expenses represent are considered. Dr. Rooney, the petitioner's treating doctor, examined the petitioner on the day of the accident and did not hospitalize him following conservative treatment in the emergency room (A. 34, 80). Dr. Rooney stated that the physical examination on the day of the accident included X-rays of the petitioner's lower back which were normal and negative in every respect and that the petitioner demonstrated a full range of motion in his lower back during this examination. Petitioner himself expressed only the subjective symptom of some moderate tenderness in his lower back before release from the hospital (A. 35). Dr. Rooney followed petitioner's course of continued improvement from office visit to office visit until petitioner was released completely to return to work on August 21, 1973, with the specific recommendation of Dr. Rooney that an operation was not warranted (A. 43). Dr. Rooney took petitioner off all medication by July 6, 1972, less than two months after the accident (A. 40). Petitioner incurred the diagnostic expense of several neurological tests during this period of time between July 6, 1972 and August 21, 1973. The majority of the objective tests performed during the office visits were either negative or showed only mild changes (A. 39-43). Dr. Rooney had another specialist perform an electromyographic study which was essentially normal and only showed some "very mild changes" in the petitioner's left tibial nerve (A. 41). At Dr. Rooney's request a third specialist, Dr. Clyde Glover, a radiologist (A. 57), performed a myelographic X-ray in the hospital to determine whether or not the petitioner had a ruptured or

bulging disc in his lower back. Dr. Glover testified that he observed no abnormality or irregularity whatsoever in the injected dye column along the spinal canal to suggest a ruptured or protruding disc at the L4-5 level of the petitioner's lower back (A. 60), and that his examination was completely negative (A. 61). Dr. Glover's report of the radiological examination contained his statement that the examination "did not reveal any definite abnormality" which meant, according to Dr. Glover, that there was no indication of any abnormality (A. 62-64). Petitioner spent a large portion of his medical expenses on diagnostic tests which were negative and not on actual treatment for his sprained lower back. In determining the amount of damages which the jury could reasonably find, the trial court could not be said to have clearly abused its discretion in granting the remittitur by considering all of the factors relating to medical expenses which included the lack of evidence of anticipated future medical expense as well as incurring much of his actual medical expense for diagnostic tests and office examinations rather than medical treatment for any residual symptoms of his injury.

Loss of Earning Capacity and Permanency of the Injury: While the trial court felt that a jury issue had been presented as to permanency of the injury and diminution of earning capacity (A. 16), it was not compelled in considering the new trial motion to ignore the countervailing evidence on these elements of damage in deciding whether a remittitur was proper. The revealing evidence on these elements of damages is best reflected by the following comments made by the trial judge after retrial of the case:

> "Moreover, Dr. Rooney himself was by no means certain in his testimony about plaintiff's future outlook. He thinks that plaintiff will probably have some trouble with his back, but he does not know 'how much it will bother him, or if it will bother him forever.' And that is as far

> as Dr. Rooney appears to be willing to go. *He did not testify in terms that plaintiff had any 'permanent disability,' and he did not attempt to measure any future disability in terms of percentage or otherwise.*" (Supp. A. 7; emphasis supplied).

In remitting the verdict to $50,000.00, the trial court was obviously still allowing substantial damages for permanency of the injury and diminution of earning capacity when in fact the petitioner's own evidence on these elements of damages was not substantial or convincing. It is apparent that the jury's verdict in the instant case included grossly excessive amounts for any loss of earning capacity and permanency of the injury. Under the meager evidence presented on these elements of damage, the trial court here was justified in ordering the remittitur because the jury verdict was not "*clearly* within the maximum limits of a *reasonable* range." *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 149 (D.C. Cir. 1969). (Emphasis added).

In addition to the trial court's observations, Dr. Rooney testified that as of his examination of August 21, 1973, the petitioner in his professional medical opinion "would be able to return to *full activity* at some time in the future." (A. 43; emphasis supplied).

Although petitioner set out medical testimony on page 7 of his Petition, the impression left by the reference to the June 27, 1972, August 8, 1972 and August 13, 1972 medical visits is somewhat misleading. After petitioner's initial visit which resulted in negative findings of any permanent injury, the petitioner was next seen by Dr. Rooney on May 29, 1972. All his findings in this examination were negative (A. 37-38). Dr. Rooney stated that petitioner's July 6, 1972, examination revealed a good range of motion and no positive neurological findings (A. 39). Petitioner's July 13, 1972 and July 24, 1972, examinations were also negative (A. 40). Petitioner's electromyo-

graphic study performed in August, 1972 reported "some very mild changes in the left tibial nerve" (A. 41). Apparently on this medical evidence, petitioner's doctor thought petitioner had some findings consistent with a herniated disc (A. 26). However, Dr. Rooney's opinion as a result of his February 22, 1973 examination is reflected by the following quotation from the record, not all of which is quoted in petitioner's brief, pages 7 and 8:

> "Q. Just briefly, in the examination on February 22, 1973 was the straight leg raising test still negative?
>
> A. Yes.
>
> Q. Was there any muscle spasm present?
>
> A. No.
>
> Q. Did he have normal motion in his lumbar spine?
>
> A. Yes.
>
> Q. Did he have any list at all in his lumbar spine?
>
> A. No.
>
> Q. Now, wouldn't all of these findings that you have just stated be objective findings that would be inconsistent with any presence of a ruptured disc at the L-4-5 level?
>
> A. Consistent with that alone? It would be consistent with a healed disc, too.
>
> Q. *Well, it could be consistent with no ruptured disc at all?*
>
> A. *Yes.*" (A. 42, Emphasis supplied)

Therefore, the petitioner's own medical witness testified that petitioner's medical findings showed either that petitioner's symptoms as of February 22, 1973, were indicative of a "healed disc injury" or no ruptured disc at all. Neither of these alterna-

tive diagnoses by petitioner's treating orthopedic specialist would support a finding of permanent injury and disability nor a substantial recovery for this element of damage. Petitioner was thereafter seen by Dr. Rooney on February 22, 1973, and there were no positive findings (A. 42, 43). Petitioner was released on August 21, 1973 to return to work and Dr. Rooney concluded that petitioner would be able to "return to full activity at some time in the future" (A. 43).

Dr. Watson, an eminently qualified neurological surgeon and past President of the Neurological Society of America, examined petitioner twice in August 1972 for the purpose of obtaining a current evaluation of his condition (A. 46, 47). He testified that the examinations were perfectly normal and indicated no intervertebial disc involvement at the time (A. 48). The X-ray studies Dr. Watson made showed no evidence of injury and were "just good, fine, healthy, normal appearing X-rays for a young, normal individual" (A. 48). During the course of his examination, Dr. Watson examined the results of the myelogram performed by Dr. Rooney and Dr. Glover and concluded that they "were fine, normal, healthy looking myelographic films, entirely within normal limits in every respect." (A. 49). Dr. Watson testified that if a person had a continuing intervertebral disc pathology over a period of 15 months "one could certainly find proof of it when they examined him" (A. 49). Dr. Watson's opinion of petitioner's condition on August 1973, was "he just simply had healed from a back strain of May" (A. 53). He recommended that the petitioner could return to work without any limitations (A. 50). Dr. Glover, the radiologist, testified as set out above that the myelographic study was completely normal (A. 61) and that he was in agreement with Dr. Watson as to the results of the myelographic study (A. 64).

There was substantial evidence in this case that indicated that there was no permanent disability as a result of the original back strain and that there should be no reduced earning ca-

pacity as a result of this injury. Nevertheless, in determining that the maximum amount of damages the jury could reasonably find was $50,000.00 and in reducing the jury's award accordingly, the trial court, nevertheless, permitted compensation for these two damage elements. However, the trial court could not be said to have clearly abused its discretion by considering all of the evidence relating to earning capacity and permanancy of the injury including the evidence of petitioner's own physician which negated a finding of permanent injury or resultant diminution of earning capacity and, accordingly, reducing the unsupported excess of the jury's award for these elements.

Pain and Suffering: The record does contain the statements of petitioner himself that he suffered pain following his back sprain. However, the subjective complaints of pain of petitioner that he expressed to his treating physician must not be considered in a vacuum but along with the negative objective findings of residual injury recorded by his treating physician. The record is replete with negative objective findings of results and tests by the various physicians who examined him (A. 34, 35, 37, 38, 39, 40, 42, 43). In reducing the verdict, the trial court was entitled to consider both the evidence which negated a finding of prolonged and severe pain and suffering and the insubstantial nature of any objective evidence of continuing pain and suffering. On retrial, Judge Henley awarded petitioner $10,000.00 for pain and suffering (Supp. A. 8). On the testimony of this record, $10,000.00 for pain and suffering was not a parsimonious award in the absence of objective symptoms of permanent injury.

PETITIONER'S AUTHORITIES

The award of damages in *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968), relied on by petitioner, has no bearing on the case at bar. In *Grunenthal*, the plaintiff's foot was hopelessly crushed by a 300 pound railroad tie, necessitating several operations including removal of bone, skin grafts and treatment for gangarene. There remained concern that the foot would be lost. Clearly no relation exists between those injury facts and the facts in the case at bar so as to support a similar outcome in the two cases.

Although petitioner also argues that the decision in the Eighth Circuit Court of Appeals contrasts with the results in *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969), and *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972), the injury facts in those cases likewise show why the ultimate results in those decisions and the instant case should be different. The facts in *Taylor* show that the plaintiff had an accident which led to a fusion of his wrist and permanent disability. The plaintiff had incurred $5,000.00 in special damages. The Court held that these facts alone would not support an $80,000.00 verdict. However, the original injuries proximately caused the plaintiff to develop ulcers with the resulting loss of 75 per cent of his stomach. There remained a chance the ulcer would reoccur. The pain and suffering, the anxiety, and the loss of enjoyment of life traceable to the stomach condition over plaintiff's life expectancy represented the principal evidence of permanent injury in support of the $80,000.00 award. *Taylor v. Washington Terminal Co.*, *supra*, at 149. Clearly, the facts in *Taylor* are not comparable to the facts in the case at bar and thus it is understandable why the final result in *Taylor* case did not control the Eighth Circuit's decision in the present case even though the reviewing standard was the same.

The injury facts in *Gorsalitz v. Olin Mathieson Chemical Co.*, *supra*, are even more inconsistent with the damage facts of the

instant case. There, the plaintiff had the whole side of his head burned off by a high voltage transformer. A jury awarded plaintiff a lump sum of $1,380,000.00 as compensation for his injury. The trial judge reduced the verdict to $690,633.00. The decision on appeal was that some part of the verdict should be remitted, but the Court of Appeals did not agree with the amount that the District Court had remitted since the District Court used the wrong standard in ordering the remittitur. After remand, the District Court entered a remittitur which reduced the verdict to $887,029.00. Subsequently after correcting the remittitur to a verdict of $889,766.00, the action of the trial court was affirmed. The difference between the two amounts was a result of the Court of Appeals recomputing the lost wages from $46,213.00 to $48,950.00. Thus, a remittitur of $490,234.00 was ultimately upheld. *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972).

There is no correlation between the injuries in the case at bar, a sprained back without surgical intervention or any rating of percent of functional disability to petitioner's body as a whole, and the crushed foot in *Grunenthal*. No factual comparison exists between the injury in this case and the fused wrist and loss of 75 percent of the plaintiff's stomach in *Taylor*, or the serious burns in *Gorsalitz*. It is submitted that none of those cases are useful as a guide as to the dollar amount of damages recoverable in the case at bar.

SUMMARY

The Court of Appeals for the Eighth Circuit clearly ascertained that the trial judge gave proper consideration to the jury's role in assessing damages and did not substitute his view of the damages for that of the jury. The Court of Appeals thoroughly reviewed the injury and damage evidence and concluded that the trial court did not clearly abuse its discretion in ordering a

remittitur to reduce the verdict to $50,000.00, two and one-half times the maximum amount of $20,000.00 which the trial court itself felt was fair and reasonable.

The present Petition for Writ of Certiorari involves no substantial legal issues but only a factual argument as to the inferences to be drawn from the damage evidence. The decision of the Court of Appeals, *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505 (8th Cir. 1974), is in accord with the decisions of the other circuits and none of the considerations of Rule 19 of the Rules of the United States Supreme Court are present. Petitioner's comment on page 3 of its Petition, that he agreed to let the case be tried on the record previously made for the stated reason that he felt that no verdict of $50,000.00 would ever be sustained by the trial judge is presumptuous conjecture on his part. What the trial judge would have done in the event a second trial to a jury had resulted in a verdict equal to or greater than the first verdict is unknown. It is more plausible to speculate that had a second jury returned a verdict equal to or greater than the first verdict, the trial judge would have felt bound by a second jury's damage award and not required the same remittitur. The petitioner voluntarily chose not to accept the $50,000 00 remittitur or a second jury trial on the issue of damages but elected to have the damage issue retried to the Court knowing the Court's own evaluation of his injury and without offering any new medical evidence on the doubtful issue of the permanency of this injury. This decision and the resultant verdict in the second trial which was not appealed to the Court of Appeals should have no bearing on this Court's consideration of the Petition for Certiorari.

CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari does not raise legal issues worthy of its issuance and should be denied and the decision of the Court of Appeals for the Eighth Circuit affirming the District Court be allowed to stand.

Respectfully submitted

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